STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED June 17, 2004
v	No. 245689 Tuscola Circuit Court
DUSTIN EVERETT NOWICKI, Defendant-Appellee.	LC No. 01-008172-FC

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order dismissing a charge of criminal sexual conduct in the third degree, MCL 750.520d, pursuant to the 180-day rule, MCL 780.131(1). We affirm.

Pursuant to MCL 780.131(1) and MCR 6.004(D)(1)(a), a prosecutor must bring an inmate to trial on a pending charge within 180 days of receiving notice that the inmate is incarcerated in a state prison. The 180-day rule does not require that trial actually commence within 180 days. If the prosecution makes a good-faith effort to bring the charge to trial within 180 days, the rule is satisfied. *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995); MCR 6.004(D)(2). The burden is on the prosecutor to justify the delay. *People v Wolak*, 153 Mich App 60, 64; 395 NW2d 240 (1986). Delay is excusable if the prosecutor shows exceptional and unavoidable circumstances which hamper the normal functioning of the trial court. Chronic docket congestion is not an acceptable excuse for delay. *Id*. at 66-67. A delay attributable to the defendant can negate a violation of the 180-day rule. *People v Finley*, 177 Mich App 215, 220; 441 NW2d 774 (1989). If a prosecutor fails to make a good-faith effort to bring a case to trial within 180 days, the defendant is entitled to have the charge dismissed with prejudice. *People v Chavies*, 234 Mich App 274, 278; 593 NW2d 655 (1999). We review a trial court's attribution of delay for clear error, *People v Crawford*, 232 Mich App 608, 612; 591 NW2d 669 (1998), and review legal issues related to application of the 180-day rule de novo. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

It is undisputed that the 180-day period began to run on March 8, 2002, the date defendant withdrew his plea in this and other cases. On both scheduled trial dates, May 7, 2002 and September 10, 2002, plaintiff requested an adjournment. The adjournment on May 7, 2002 was necessitated by the need to try a case involving a person who had been incarcerated longer

than defendant. This delay did not result from plaintiff's intent to delay trial in the instant case, *Bell*, *supra* at 279, but rather was caused by unavoidable circumstances.

The adjournment on September 10, 2002, however, was caused by the fact that plaintiff was unprepared to proceed to trial on that date. Plaintiff asserts that the lack of preparedness resulted from confusion generated by defendant's withdrawal of his pleas in this and other cases and the lack of a decision from the trial court on defendant's motion to remand this case to the district court for a further preliminary examination. However, these circumstances had existed since March 8, 2002, and had not prevented plaintiff from making a good-faith effort, consisting of filing proposed jury instructions, proposed voir dire questions, and a pretrial motion, and serving subpoenas, to bring the case to trial on May 7, 2002. Plaintiff provides no reasonable explanation for the lack of a similar good-faith effort between May 7, 2002 and September 10, 2002. As counsel for plaintiff recognized at oral argument before this Court, the prosecutor's office did not take a proactive approach to the September 10 date, which would have been to assume trial would take place on the scheduled date. Its decision to assume trial would not take place, in the absence of any such indication from the trial court, is not an exceptional and unavoidable circumstance. *Wolak, supra.* The trial court's finding that plaintiff did not make a good-faith effort to bring the matter to trial on September 10, 2002 was not clearly erroneous. *Crawford, supra*. Dismissal was appropriate. *Chavies*, *supra*.

Affirmed.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray